

**Quarterly Report**  
**of the**  
**ATTORNEY GENERAL**  
**of**  
**ALABAMA**



**For The Period**  
**From January 1, 1962**  
**Through March 31, 1962**

**VOLUME 106**

MACDONALD GALLION, Attorney General



T. O. "Tillie" Walker

QUARTERLY REPORT  
of the  
**ATTORNEY GENERAL**

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A L A B A M A

For the Period

From January 1, 1962

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TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS  
OF ALABAMA:

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from January 1, 1962 through March 31, 1962, is published in compliance with the provisions of Title 55, Section 228, Code of Alabama 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy or county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

MACDONALD GALLION  
Attorney General

MACDONALD GALLION

Attorney General

|                          |                                |
|--------------------------|--------------------------------|
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| Administrative Assistant | Sr. Assistant Attorney General |

Assistant Attorneys General

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**OPINIONS**



January 16, 1962

Honorable W. A. LeCroy, Superintendent  
State Department of Education  
Montgomery 4, Alabama

Schools — Free Textbooks — Appropriations — Alabama  
State Hospitals — State and State Departments.

1. The State Department of Education shall purchase and furnish all state owned textbooks needed for the pupils and teachers in classroom schools operated under the Jurisdiction and supervision of the Alabama state hospitals and pay for same from appropriations made for the free textbook program for the fiscal years ending September 30, 1962, and September 30, 1963.

2. The appropriations made for the free textbook program for the fiscal years ending September 30, 1962 and September 30, 1963, must be used only for textbooks in first, second, and third grades in the tax supported public elementary schools of the state.

Opinion by Assistant Attorney General Madison

Dear Mr. LeCroy:

Your request for an official opinion bearing date of January 10, 1962 is as follows:

“Section 1 of Act No. 423, approved November 13, 1959, reads as follows:

“The state department of education shall purchase and furnish state-owned adopted textbooks for the pupils and teachers in classrooms and schools operated under the jurisdiction and supervision of the Alabama state hospitals. Such purchases shall be made from appropriations to the state department of education for the purchase of textbooks to be furnished free in the first six grades in the tax supported public schools of the state. The state board of education may make and enforce regulations for the proper care and accounting for such state-owned textbooks.”

“Section 13 of Act No. 581, approved November 19, 1959, reads in part as follows:

“In any county of the state where the pro rata share of the county's part of the sum or amount appropriated for the purpose of furnishing state-owned textbooks is not sufficient to provide free textbooks for all of the grades in the public schools from one to six, inclusive, then the authorities charged with the duty of purchasing such books shall purchase enough books with the available funds

to supply the first grades with books, and if any funds remain after books for the first grades have been purchased then the same authority shall purchase enough books for the second grades of the public schools, and in like manner shall purchase books for the third, fourth, fifth, and sixth grades insofar as the funds allotted to the county will permit.'

"The Legislature of Alabama in Regular Session, 1961, Act No. 859, approved September 8, 1961, appropriated for the free textbook program \$430,334 and \$430,719 for the fiscal years ending September 30, 1962, and September 30, 1963, respectively. The following statement appears in the act:

"The above appropriation shall be expended by the State Board of Education for the purpose of furnishing free textbooks in the tax supported public elementary schools or the state in accordance with the statutes and regulations of the Board in regard thereto, but only for the first, second, and third grades of such schools.'

"I shall appreciate your official opinion in answer to the following questions:

"1. Can the State Department of Education legally continue to purchase and furnish state-owned adopted textbooks for pupils and teachers of the first six grades of schools operated under the jurisdiction and supervision of the Alabama state hospitals, or shall such purchases be limited to the first, second, and third grades?

"2. Can the State Board of Education legally expend any of the appropriations made for the fiscal year ending September 30, 1962, and the fiscal year ending September 30, 1963, for the purpose of furnishing free textbooks in the public tax supported elementary schools of the state in grades 4, 5, and 6?

"3. In the event your answer to Question No. 2 is in the affirmative, can textbooks be purchased for all the upper grades(4, 5, and 6), or must each grade beginning with the fourth be adequately supplied with textbooks before textbooks can be furnished to the next succeeding grade?

"Your usual prompt attention to this request will be appreciated."

You will note that the first sentence of Section 1 of Act No. 423, approved November 13, 1959, cited in your request does not limit the textbooks needed to the first six grades. It applies to all textbooks needed by the schools operated under the jurisdiction and supervision of the Alabama state hospitals.

The second sentence of said act provides that the textbooks shall be purchased from the appropriations for free textbooks in the first six grades in the tax supported public schools of the state.

It is my opinion that the **free textbook fund** as the source from which the books are to be paid which are furnished for the Alabama

state hospital schools is where emphasis should be placed and not on the fact that appropriations for the first three grades only, instead of six, have been made by the Legislature for the fiscal years ending September 30, 1962 and September 30, 1963.

The funds provided by Act No. 859, approved September 8, 1961, quoted in your request, for the free textbook program are available and must be used to purchase all books, regardless of grades needed for the schools operated under the jurisdiction and supervision of the Alabama state hospitals. So considered, your question one is answered in the affirmative.

I am of the opinion that the express declaration by the Legislature, as contained in Act No. 859, Regular Session 1961, approved September 8, 1961, to the effect that the appropriations for free textbooks in the tax supported **public elementary schools** of the state, shall be expended "only for the first, second, and third grades" of such schools prevents use of the funds in those schools in grades four, five, or six, or any one of them.

The second question is therefore answered in the negative, rendering it unnecessary to answer your third question, which is predicated on an affirmative answer to question two.

This opinion, of course, does not deal with the right and powers of either counties or municipalities to furnish free textbooks.

Yours very truly,

MACDONALD GALLION  
Attorney General

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January 17, 1962

Honorable Guy Sparks  
Commissioner of Revenue  
Department of Revenue  
CAPITOL

Licenses — Municipalities — Sales Tax — Taxation.

A licensee who is subject to a two per cent municipal "sales tax" is entitled to the one per cent exclusion provided by Act No. 652, Regular Session 1961, approved September 8, 1961, in computing the amount due from him under the State Sales Tax law.

Opinion by Assistant Attorney General Gish.

Dear Mr. Sparks:

Your request for an official opinion, under date of December 22, 1961, is as follows:

"Act No. 652 of the Legislature of 1961 in Regular Session provides as follows:

"Municipal privilege license taxes which are levied and collected by the application of a flat percentage rate, not exceeding one per cent, of gross sales, or gross receipts from sales, and which are passed on directly by the licensee-seller to the purchaser-consumer, shall be excluded from gross sales, or gross receipts, as the case may be, in the computation of the Sales Tax levied by this State, under the provisions of Act No. 100, H. 94, approved August 18, 1959 (Acts 1959, vol. 1, p. 298), as amended."

"You will note that this Act provides that municipal privilege license taxes which are levied, not exceeding one per cent, and which are passed on directly to the purchaser shall be excluded from the measure of the State sales tax. In view of the language used in this Act we would like to have your opinion of the proper application of the exclusion in case of a municipal privilege license tax which is levied at a two per cent rate. Would the Department of Revenue be justified in allowing any exclusion where the levy is two per cent?"

The type of municipal privilege license tax to which Act No. 652, Regular Session 1961, approved September 8, 1961, refers is commonly called a municipal "sales tax."

Act No. 652, *supra*, a portion of which is quoted in your request, is designed to allow those who are subject to municipal "sales taxes" to exclude said "sales taxes" in the computation of the amount due from them under the State Sales Tax law. The exclusion is limited to one per cent of gross sales or gross receipts paid to the municipal licensee by the consumer.

Act No. 652, *supra*, was enacted for the relief of the municipal "sales tax" licensee. I am of the opinion that the legislature did not intend to grant the above-mentioned exclusion to licensees in certain municipalities which have a "sales tax" rate of one per cent and, at the same time, to deny said exclusion to licensees in other municipalities which have a higher "sales tax" rate.

Therefore, you are advised that the Department of Revenue should allow a municipal "sales tax" licensee, in municipalities where the rate is two per cent, the one per cent exclusion prescribed by Act No. 652, *supra*.

Very truly yours,

MACDONALD GALLION  
Attorney General

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February 15, 1962

Honorable W. A. LeCroy, Superintendent  
State Department of Education  
Montgomery 4, Alabama

Schools — Teachers — Retirement — United States

“Earnable compensation,” on which is based member’s contribution to Alabama Teachers’ Retirement System, includes money voluntarily diverted to pay premium of tax sheltered annuity authorized by Section 403 (b) of United States Internal Revenue Code, as amended.

Opinion by Assistant Attorney General Mentz.

Dear Mr. LeCroy:

Your request for an official opinion bearing date of January 4, 1962 is as follows:

“RE: Teachers’ Retirement System, Tax Favored Employee Annuities

“Recent Federal Legislation (H. R. 4317) has been passed making it permissible for any public school board to purchase Tax Sheltered Annuities for its teachers. Briefly, the new law (P. L. 87-370, October 4, 1961, amending Code Sec. 403(b) ) assures to an employee of an educational institution run by a state or municipality that he will be able to receive a deferral of tax on a portion of his salary if his employer, instead of paying this amount to him directly, uses it to purchase a retirement annuity.

“Under the Internal Revenue Act, Section 403(b), Boards of Education are permitting a part of the teacher’s over-all income to be diverted into a tax-free annuity. For example: a teacher under a salary contract for \$5,000 per year may have \$500 diverted into a tax-free annuity premium, and report to the Department of Internal Revenue an income of only \$4,500, and accordingly pay tax on the \$4,500 income, and not the \$5,000 contractual income.

“According to the Alabama State Teacher’s Retirement System, Section 362 under definition Code of Alabama, 1940, Title 52, Chapter 14, “‘Earnable compensation” shall mean the full rate of the compensation that would be payable to a teacher if he worked the full normal working time. In cases where compensation includes maintenance, the Board of Control shall fix the value of that part of the compensation not paid in money.’ Salary means the actual compensation received by the teacher during any school year regardless of from what source the compensation is received.

“It appears to me that the purchase of the Tax Favored Employee Annuities will be made pursuant to an agreement between the

teacher and the school board, modifying the teacher's contract. Participation by the teacher in this purchase transaction will be entirely **voluntary**. The purchase of the annuity will depend entirely upon the **assent** and voluntary **election** of the employee.

"I would like to point out here that the term 'compensation' is defined in **Black's Law Dictionary**, fourth edition, as follows: 'The remuneration or wages given to an employee or especially to an officer. Salary, pay, or emolument.' It has been stated by some courts that the word 'salary' and 'compensation' are synonymous.

"Under the facts stated, a teacher, by his own voluntary act, has agreed that his contract with the school board be modified so that a portion of his salary is converted into a right to participate in Tax Favored Employee Annuities. This right to participate in the Tax Favored Annuities is actually **received** by the teacher. The teacher, by his voluntary election, has waived his right to receive payment of a part of his salary in cash and has agreed that such portion may be paid to him in the form of participation in the Tax Favored Employee Annuity.

"It seems to me that the election by the teacher to participate in the purchase of a Tax Favored Employee Annuity, although reducing his 'take-home-pay,' would not decrease the actual compensation received by him during the school year. The actual compensation received, although in different form pursuant to his own voluntary election and assent, would remain the same as previously.

"It therefore follows that, in the case previously described, the teacher has actually received a remuneration or consideration in payment of personal services in the amount of \$5,000, a portion of which is paid in cash and the remaining portion (\$500) is paid by the teacher receiving the right to participate in the purchase of a Tax Favored Employee Annuity.

"With the foregoing in mind, I would appreciate very much your opinion as to whether or not this type of an optional annuity program will have any effect on the Alabama State Teachers' Retirement System. In other words, can the premium paid for annuities wherein such a premium is a part of the over-all teacher's income be classified as salary under the Teachers' Retirement Law; and shall a teacher contribute 3½% on such premium? Will the teacher contribute 3½% on the \$5,000 or \$4,500 income?

"Included are copies of the Public Law 87-370 passed by Congress on October 4, 1961, and also a copy of a letter from Mr. Patterson, District Director of Internal Revenue, Birmingham, Alabama, stating his views as pertaining to the validity of this type Tax Sheltered Annuity."

Our statute provides that the rate of a member's contribution to the Alabama Teachers' Retirement System shall be "three and one-half per centum of his earnable compensation." See Title 52, Section 369, Code of Alabama 1940, as amended by Act No. 61, General Acts of Alabama 1943, page 35, approved June 1, 1943; Act No. 41, Acts of Alabama 1953, page 44, approved June 3, 1953; Act No. 280, Acts of Alabama 1955, page 630, approved August 23, 1955; Act No. 495, Acts of Alabama 1955, page 1136, approved September 9, 1955; Act No. 115, Acts of Alabama, Second Special Session 1959, page 351, approved August 24, 1959.

As noted by you, our statute defines "earnable compensation" as "the full rate of the compensation that would be payable to a teacher if he worked the full normal working time," and it provides that "in cases where compensation includes maintenance, the board of control shall fix the value of that part of the compensation not paid in money." See Title 52, Section 362, Code of Alabama 1940, as amended by Act No. 61, *supra*, Act No. 41, *supra*; Act No. 532, Acts of Alabama 1957, page 747, approved September 13, 1957.

Clearly, the voluntary diversion of \$500.00 of a teacher's annual salary of \$5,000.00 for payment of an annuity premium does not create a diminution of his "earnable compensation." Section 403(b) of the United States Internal Revenue Code of 1954, as amended by Public Law 87-370, 87th Congress, approved October 4, 1961, 26 U.S.C.A. §403(b), simply permits him to defer payment of federal income tax on \$500.00 of his annual salary.

Significant is the fact that in his letter, which is attached to yours, and which discusses tax sheltered annuities for employees of public school systems or educational institutions, Mr. George D. Paterson, District Director, Internal Revenue Service, states, in part:

"... Form W-2, which is a statement furnished employees at the end of the year showing the amount of salary paid during the year, should show the gross salary. The employee, in preparing his tax return, should deduct on page 1 of his return the amount excludable under Section 403 of the Internal Revenue Code."

It should be borne in mind that the State of Alabama has no provision for excluding for state income tax purposes such annuity premiums.

All the facts considered, it is my opinion that the money voluntarily diverted for payment of the premium on a tax sheltered annuity authorized by Section 403(b), *supra*, must be considered as part of a teacher's gross annual salary or "earnable compensation" and that, accordingly, he must contribute to the Alabama Teachers' Retirement System a sum equal to three and one-half per centum of

such annuity premium. In the illustration presented by you, the teacher's contribution would be three and one-half per centum of \$5,000.00.

Yours very truly,

MACDONALD GALLION  
Attorney General

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February 23, 1962

Hon. Herbert R. Nation  
Secretary

Montgomery County Democratic  
Executive Committee  
Montgomery, Alabama

Elections — Costs — Absentee Ballots — Primary Election  
— Supplies — Act No. 154, Special Session of the Legis-  
lature 1961—"9-8-Plan."

1. The expenses of the district primary runoff provided for by Act No. 154, Special Session 1961, will be borne entirely by the State.
2. It is not necessary to have separate election facilities, other than paper ballots, for the state-wide congressional primary runoff election on May 29, 1962.
3. Absentee ballots must be prepared and used in the district runoff primary election on May 15, 1962.
4. The county executive committee of the party holding primary election may inspect and release voting machines used in the May 1st primary election, so that machines will be available in the May 15th district runoff, if necessary.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of January 26, 1962, is as follows:

"Act No. 154, approved September 15, 1961, and passed by the

1961 Special Session of the Legislature, commonly referred to as the '9-8-Plan' provides for the manner of nominating candidates for Congress in primary elections in 1962 and at any time thereafter until the State is redistricted.

"The first primary will be held on Tuesday, May 1, 1962, and said Act No. 154 poses no problems or special requirements for the congressional races so far as the May first primary is concerned, as the candidates will be running from the nine congressional districts as now constituted.

"If no candidate in a District receives a majority of all the votes cast in such District in the first primary, then a district run-off primary election is ordered to be held on the second Tuesday following the first primary, or May 15, 1962. Act 154 provides the Chairman of the State Executive Committee shall certify direct to the Judges of Probate the names of the two candidates receiving the highest number of votes in a district where no one has received a majority, and the probate judges shall have prepared and printed all election supplies and ballots to be used in such district runoff primary election.

"Act 154 further provides that the names of the nine candidates for Congress who are nominated by districts be placed upon paper ballots to be used in a statewide runoff primary election to be held on the fourth Tuesday next following the date of the first primary, or May 29, 1962, at which time eight of the said nine district nominees will be selected as nominees to be placed upon the November general election ballot for the filling of the eight congressional seats Alabama is then entitled to elect.

"The validity of Act No. 154 as well as questions as to its administration were raised in litigation in the case of V. R. Jansen, Judge of the Probate Court of Mobile County, versus Maurice A. Downing, etc., recently decided by the Supreme Court of Alabama as Case No. 32, First Division. Such decision upheld the constitutional validity of the Act, but declined to pass upon the administrative or operational details of the Act. The Supreme Court significantly stated:

"This Act does not purport to cover the entire subject of holding primary and general elections. It deals only with congressional elections; and, in applying it to such election, **it must be construed in connection with other applicable election laws.** (Underscoring mine) The manifest legislative purpose and intent was to continue the application to congressional elections of all laws already applicable thereto except insofar as they may be in conflict with the Act's provisions. When the Act is considered in connection with the non-conflicting provisions of other applicable election laws, we think there is provided a reasonably workable scheme for holding the congressional elections, although we realize there

may be need of working out the practical details for conducting the elections. . . In this connection, we do not think it inappropriate to call attention to the statute authorizing county officials to obtain opinions from the attorney-general "as to any question of law connected with" their duties.'

"The question has been raised that the district primary runoff election might impose an impossible financial burden on the counties. However, it is my belief, in view of the Attorney-General's Opinion in re Act No. 160 of the 1955 Legislature (Quarterly Reports, Vol. 100, p. 15), that this is not correct as the State will be obliged to reimburse the County for all expenses in holding such election as no candidate for a county office would appear on the May 15th ballot. Please advise if this is correct.

"Some additional questions on the operation of Act 154 occur. These appear below with my comments on them.

"1. Is it necessary to have separate election facilities, other than paper ballots, for the statewide congressional primary runoff election on May 29th?

"COMMENT: Construing Act 154 in connection with other existing election laws, it would seem that in Montgomery County, which is a voting machine county, that it would not be necessary to appoint six officials for a voting box as required for paper ballots just because a paper ballot is being used for the one office of representative in congress, but that the four officials required for each voting machine could properly handle the distribution, collection, safekeeping, tabulation and certification of paper ballots for the congressional race. Balloting on the voting machines will necessarily be short, as there can only be two candidates for each office in the runoff primary. As the voter signs the poll list and before entering the voting machine booth he can be handed a paper ballot with the names of the nine congressional candidates and instructions to vote for eight and eight only of them printed thereon. The voter then enters the voting machine booth to vote on the machine and while there can mark his paper ballot for the eight congressional candidates of his choice. Upon leaving the voting machine booth he hands his paper ballot to the inspector who will check it for the initials he has placed on it, then number it and place a black seal over the numbered square, all as provided by Sections 180 and 356, Title 17 of the Code. The paper ballots thus cast can be kept by the voting machine officials in a container for that purpose until the polls close after which such officials can tabulate and certify the results in the usual manner provided by law. Such paper ballots after being counted can be placed in an envelope and sealed, and then placed and locked in the voting machine as are the other records, certificates, etc.,

required by law to be placed therein. In this fashion the voting machine would become the ballot box to be opened only as provided by law. Considering the applicability of existing laws, it is inconceivable the Legislature intended voting machine counties to purchase and provide separate ballot boxes and booths, and also appoint six officials, just to receive and tabulate a paper ballot containing only nine names of congressional candidates.

"2. If there is a district runoff primary election on May 15, 1962 for congressional candidates must absentee ballots be prepared for said runoff primary election of May 15, 1962?

"COMMENT: Section 64, Title 17 of the Code requires absentee ballots to be delivered to the register not less than twenty-one days prior to the holding of the election on May 15, 1962. Obviously this is impossible as the first primary is not held until after such deadline, that is on May 1st or a mere 14 days before the district primary runoff of May 15th. Consequently, there is a conflict between the requirements of said Section 64 and the requirements of Act 154 in respect to the holding of the May 15th district primary runoff, and, to the extent of such conflict Act 154 would be controlling and the requirements of Section 64, Title 17 and other requirements for absentee voting would be repealed insofar as they are impossible of fulfillment with respect to the congressional primaries and elections ordered by Act 154.

"3. Would the County Executive Committee of the Party holding the primary elections, as the canvassing board, be entitled to inspect and release the voting machines subsequent to the primary election of May 1, 1962, so that such machines would be available for use, if necessary, in the May 15, 1962 district runoff primary election, and thereby avoid the expense of purchasing an extra set of machines just for use in the May 15th runoff?

"COMMENT: The County Executive Committee is the 'Board' charged with canvassing the returns of the May 1, 1962 primary under Section 366, Title 17, Code of Alabama, Section 114, Title 17 of the Code provides such Board is authorized to break the seals and make a record of the numbers on all counters of each machine and to remove the election records from the machine in the event another election (such as the May 15th election) is required to be held during the time for which the machines are required to be locked. In view of the foregoing it seems there is no doubt the County Executive Committee, if necessary, has the right to take the data from the machines used on May first and release them for use on May 15th.

"I hope you can agree with the suggestions and conclusions stated in my comments above, and that you can soon give me an official opinion compatible therewith upon the three numbered questions and one unnumbered question asked herein."

In answer to your unnumbered question, as to the costs of the district primary runoff election provided to be held under the provisions of Act No. 154, Special Session of the Legislature 1961, I concur in your conclusion that the entire costs of said district primary runoff election will be borne by the State of Alabama. If it be necessary to hold such district primary runoff election, only federal officers will be nominated therein, and under the opinions of this office and appropriate statutes, when only federal officers are to be nominated in a primary, the entire costs thereof are borne by the State of Alabama. Title 17, Sections 343 and 429, Code of Alabama 1940; Quarterly Report of Attorney General, Vol. 100, page 15.

The comments contained in your letter, as they relate to questions 1, 2 and 3, in my opinion, contain sound statements of the law and are adequately supported by citations of appropriate sections of Title 17, Code of Alabama 1940, and conform to the principles set out in the case of **V. R. Jansen, Judge of Probate of Mobile County, vs. Maurice A. Downing, etc.**, Supreme Court of Alabama Case No. 32, First Division. This case made pertinent comments in regard to Act No. 154, quoted by you in your request, as well as upholding the constitutionality of Act No. 154. I do not feel that I can add to the comments contained in your letter, as they relate to the several questions therein propounded. The only purpose to further extend your comments would unduly lengthen this opinion. I, therefore, adopt the comments contained in your letter, as set out in each question, and adopt them as the opinion of this office.

This opinion only relates, and is dealing primarily with, those counties in which voting machines are used. There is no problem presented by Act No. 154 in those counties in which paper ballots are used. In those counties, the primaries called in Act No. 154, supra, should be held in the manner provided by law, the only requirement being, another office is added to the ballot.

Yours very truly,

MACDONALD GALLION  
Attorney General

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March 12, 1962

Honorable John Patterson  
Governor, State of Alabama  
CAPITOL

State and State Departments — Employers and Employees  
— Social Security — Tennessee — Tombigbee Waterway  
Development Authority.

Tennessee-Tombigbee Waterway Development Authority is  
legal entity distinct from states creating it and is enabled  
to contract with Federal authorities for purpose of effect-  
ing coverage of its employees under Social Security Act.

Opinion by Assistant Attorney General Mentz

Dear Governor Patterson:

Your request for an official opinion, bearing date of March 7,  
1962, is as follows:

“As Chairman of the Tennessee-Tombigbee Waterway Develop-  
ment Authority, I have been requested to obtain from the  
Attorneys General of Alabama, Mississippi, Tennessee and  
Kentucky opinions in answer to the following question:

“ ‘Does the Tennessee-Tombigbee Waterway Development Author-  
ity have the characteristics of a legal entity distinct from the  
states creating it and whether it is enabled to contract with the  
Secretary of the Department of Health, Education and Welfare  
for the purpose of effecting coverage of its employees under the  
Social Security Act.’

“I am enclosing a copy of the opinion rendered by the Attorney  
General of Mississippi and other allied papers. Please return these  
along with your opinion.

“Thank you very much, and I would appreciate a prompt reply.”

The powers conferred on the Tennessee-Tombigbee Waterway  
Development Authority by Articles III and IV of Act No. 355, Acts of  
Alabama 1957, Regular Session, page 467, approved August 23, 1957,  
are so broad in their scope as to convince me that said Authority has  
the characteristics of a legal entity separate and distinct from the  
states which created it.

It is my opinion that said Authority, having the power to engage  
in business transactions independently of the State of Alabama, is  
enabled to contract with the Secretary of Health, Education and  
Welfare for the purpose of effecting social security coverage for its

employees pursuant to Section 218(k) of the Social Security Act, as last amended.

As requested, I am returning to you copy of the opinion rendered by the Attorney General of Mississippi and other allied papers.

Very truly yours,

MACDONALD GALLION  
Attorney General

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March 21, 1962

Honorable R. S. Ward  
Judge of Probate  
Geneva County Court House  
Geneva, Alabama

Licenses — Photographers — Opinions Overruled, Modified or Distinguished.

1. Under Title 51, Section 569, Code of Alabama 1940, and as the statute is presently worded, the license tax applicable to transient or traveling photographers is \$5.00 per week for each such photographer, and is a separate and distinct license tax from the annual license levied on photographers having studios or fixed locations in this State, and which license is levied on each such fixed location and is measured by the sliding scale provided for in the statute.

2. A photographer who has a fixed location in the county, and who has paid the appropriate annual license tax under Section 569, supra, for same can operate out of such fixed location by taking pictures throughout the same county without paying the transient photographer's license of \$5.00 per week.

3. A transient or traveling photographer having no fixed location in the county can, by paying the transient photographer's license of \$5.00 per week in the county, take pictures throughout the county without the payment of another license under Section 569, supra, during the same week.

4. All opinions of this office or parts thereof which are in conflict with this opinion are hereby expressly modified to conform hereto.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion bearing date of February 22, 1962, is as follows:

"Questions have arisen in my jurisdiction as to the proper interpretation to be placed on Title 51, Section 569, Code of Alabama, with reference to the license due by photographers. It appears that in towns of 1,000 to 7,000, photographers whose business is at a fixed location must pay a license of \$7.50. In other places less in size, the license would be \$4.50.

"The first question which I would like answered is whether a person holding a license for a business conducted at a fixed location is permitted under such license to take photographs at places other than the fixed location. Specifically, would the holder of such a license for a business at a fixed location be permitted to take photographs throughout the county in which the license is issued. Would two state and county licenses be required for such purposes, and if so what licenses.

"Section 569 further requires a license for a photographer without a fixed location as follows:

"For each transient or traveling photographer, \$5 per week."

"Does the procurement of the transient photographer's permit the taking of photographs throughout the county where the transient photographer has no fixed location for business."

In construing License Tax Schedule 79 of Section 361 of an Act of the Legislature, approved September 15, 1919 (Gen. Acts 1919, page 425), which levied the license tax on photographers and photograph galleries at that time, this office in two separate opinions has interpreted the statute as it was worded under the 1919 Act to levy in effect only one license.—Biennial Report of Attorney General 1918-1920, page 310, and Biennial Report of the Attorney General for 1928-1930, page 359. Thus, under those opinions this office gave no importance to whether the photographer took the pictures at a fixed location or as a fixed location or as a transient photographer. The same license was said to apply and to be measured in all cases by the sliding scale provided for in the statute depending upon the population of the town, city or other place in the county where the photographer operated.

Schedule 79, *supra*, of the 1919 Acts, reads as follows:

"Schedule 79. PHOTOGRAPHER—TRAVELING:—For each photo-

graph gallery, or person, firm or corporation engaged in photography, **whether the business** is conducted at a fixed location: In cities and towns of seventy-five thousand inhabitants and over, seventy-five dollars; in cities and towns of less than seventy-five thousand and not less than thirty-five thousand inhabitants, fifty dollars; in cities and towns of less than thirty-five thousand and not less than seven thousand inhabitants, twenty-five dollars; in cities and towns of less than seven thousand and over one thousand inhabitants, ten dollars; **in all other places, five dollars.** The payment of the license required by this schedule shall authorize the doing of business only in the town, city or county where paid. For each transient or traveling photographer, **five dollars in each county in which he does business.**" (Emphasis supplied.)

This office then in construing the 1919 Act in said two official opinions, and in reaching the above conclusion, held the phrase "**whether the business** is conducted at a fixed location," to be superfluous, and actually eliminated such phrase for the purpose of arriving at the meaning of the statute. It construed "whether" to mean "whether or not," and read the statute as it existed at that time to include within its sliding scale and measure, each photograph gallery, or person, firm or corporation engage in photography, regardless of whether the photographer operated from a fixed location or not. This had the effect of practically eliminating the license on transient photographers as an independent or separate license or on transient photographers as such and as a distinct class.

Under these interpretations of the statute as it existed under the 1919 Act, a photographer (regardless of whether he had a fixed place of business) then could operate throughout the county for a yearly license tax of \$5.00 to be paid in each county involved so long as he did not do business in a city or town of more than one thousand inhabitants. If, however, he operated in a city or town of more than one thousand inhabitants he was subject to a license tax measured by the sliding scale and based on the amount of the population for each city or town in which he operated. This was held to be true regardless of whether the photographer was a so-called transient or not, as the statute was said to provide that "payment for the license required by this schedule shall authorize the doing of business only in the town, city or county where paid."

Some six years after the date of the latest of said two official opinions, the Legislature when enacting the 1935 General Revenue Law (General Acts 1935, page 484) appears to have intentionally attempted to change the situation and to circumvent the effects of such rulings by making three very notable changes in the license statute.

The statute as so changed and as designated as Scheduled 105 of the 1935 Acts, reads as follows:

"Schedule 105. For every photograph gallery, or person engaged in

photography, **when** the business is conducted at a fixed location: In cities and towns of seventy-five thousand (75,000) inhabitants and over, Twenty-five Dollars (\$25.00); in cities and towns of less than seventy-five thousand (75,000) and not less than forty thousand (40,000) inhabitants, fifteen dollars (\$15.00); in cities and towns of less than forty thousand (40,000), and not less than seven thousand (7,000) inhabitants, ten dollars (\$10.00); in cities and towns of less than seven thousand (7,000) and over one thousand (1,000) inhabitants, five dollars (\$5.00); **in all other places whether incorporated or not three dollars (\$3.00)**. The payment of the license required in this Schedule shall authorize the doing of business only in the town, city, or county where paid. **For each transient or traveling photographer, five dollars (\$5.00) per week.**" (Emphasis supplied.)

The statute as so amended and enacted has also been brought forward without change in the 1940 Code as Section 569 of Title 51.

The word "**whether**" as contained in the 1919 Act, and which was given such importance by this office in its said opinions construing that Act, was changed in the 1935 Act to "**when**." The minimum license under the sliding scale based on the amount of the population was changed from \$5.00 to \$3.00 for places in the county having less than one thousand inhabitants. In addition, the license on the so-called transient or traveling photographer was charged from a \$5.00 license for "each county" in which such business is done to a license of \$5.00 "per week."

It is evident then that these were very material changes, and that they were obviously made by the Legislature to make it clear that it contemplated under the 1935 Act two separate and distinct levies and licenses. That is, one on the photographer having a fixed location based on the sliding scale for each fixed location, and one on each transient or traveling photographer of \$5.00 per week.

The word "**whether**" suggests an alternative, and is said to be equivalent to "**whether or not**." On the other hand, "**when**" is said to literally mean "**at which time**," and clearly does not give an alternative. See Webster's New International Dictionary Second Edition, and other standard dictionaries. Also to make sure that the minimum license under the sliding scale applicable to the photographer doing business "**at a fixed location**," and for each fixed location, was not in any respect confused with the \$5.00 license applicable to "**each transient or traveling photographer**," the minimum scale was reduced from \$5.00 to \$3.00. And lastly, the license on transient photographers was changed from a **yearly license** (as the license on fixed locations is levied), to a license of "**\$5.00 per week**" on each transient photographer. These matters will be found to have a great deal of significance if the two opinions of this office, which are cited above, are read and considered with the statute before and after amendment. Moreover, the Supreme Court of Alabama in two recent decisions, namely, **Graves v. State**,

258 Ala. 359, 62 So. 2nd 446, and **Haden v. Olan Mills, Inc.** (decided Nov. 16, 1961, rehearing denied Dec. 21, 1961), 135 So. 2d 288, 389, has treated these licenses as two separate levies on two distinct operations.

The history of the statute being so considered in the light of its present form seems to clearly show that it is not the intent of the Legislature to apply the sliding scale to anything but the license provided for a photographer doing business "at a fixed location," and for each fixed location. Thus, the provision **that the payment of the license required by this Section shall authorize the doing of business only in the town, city or county where paid**, can now be consistently applied only in cases where a license for a fixed location is required. To apply this provision otherwise than to a fixed location would serve to practically nullify the provisions of the present statute calling for a license tax of "\$5.00 per week," on each transient or traveling photographer, and appears repugnant thereto.

With this background in view, your specific questions are answered, as follows:

1. The photographer described by you in your first question would be due to pay only one license, unless he has more than one fixed location in the county.

If he has a studio or fixed location in the county and has paid the license called therefor based on the sliding scale provided in Section 596, supra, then if such photographer operates out of such fixed location in taking exposures or pictures in places in the same county other than at a fixed location, he would not be required to pay the transient or traveling photographer's license in that particular county. This is true because in order to fall within the scope of the transient photographer's license, one must be a "transient or traveling" photographer in the county involved.

In accordance with the definitions contained in Webster's and other standard dictionaries the words "transient" and "traveling" denote a quick passing, a lack of permanency, or the visiting of places other than where one lives or resides. This would not seem to fit the photographer who has a fixed location in the county and who operates therefrom, even though at times he takes pictures at places other than where he has a fixed location in the county.

2. Your second question is answered to the effect that the payment of the transient or traveling photographer's license of \$5.00 per week by a photographer doing only a transient business in the county would enable such photographer to take pictures throughout the entire county without having to pay any additional transient photographer's license for that entire week. No license for a fixed location and under the sliding scale provided in Section 569, supra, would be due, as it is understood that for the purpose of this opinion that the photographer

to whom you refer is a transient photographer who does not have or operate from any fixed location in the county involved.

Incidentally, a county license amounting to one half of the state license would also be due under Title 51, Section 831, as amended, Code of Alabama 1940, in each instance where a state license is due.

All opinions of this office or parts thereof which are in conflict with this opinion are hereby expressly modified to conform herewith.

Very truly yours,

MACDONALD GALLION  
Attorney General

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